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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GUY MICHAEL HANDY,

Defendant and Appellant.

D072821

(Super. Ct. No. SCN371466)

APPEAL from a judgment of the Superior Court of San Diego County, Richard R. Monroy, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

This case presents diametrically opposed versions of the same crime. According to the victim (J.S.), she was walking to work from the bus stop at night when Guy

Michael Handy attempted to take her large, pink purse by force. In contrast, Handy claims he was the real victim, and J.S. took his small, black bag, causing him to chase her and demand its return. The jury believed J.S. and convicted Handy of attempted robbery (Pen. Code,<sup>1</sup> § 664, 211; count 1). The jury also convicted Handy of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2). Handy admitted six prison priors (§ 667.5, subd. (b)), a serious felony prior (§ 667, subd. (a)), and a strike prior (§§ 667, subds. (b)-(i), 1170.12) The court denied Handy's request to strike a prior felony from 2011.

The court sentenced Handy to prison for seven years eight months, consisting of 32 months under count 1 (the low term of 16 months doubled for the strike prior) plus a mandatory consecutive five-year term for the serious felony prior. The court also imposed the one-year term for the prison priors concurrently and sentenced Handy to "time served" for count 2.

Handy appeals, contending: (1) substantial evidence did not support his conviction for robbery; (2) the trial court improperly admitted Handy's prior robbery conviction; (3) the court prejudicially erred by failing to instruct the jury regarding claim of right; (4) the court improperly instructed the jury as to mistake of fact; and (5) the court abused its discretion in denying his *Romero*<sup>2</sup> motion to dismiss allegations of a prior strike conviction. We conclude Handy's arguments lack merit. As such, we affirm.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

## FACTUAL BACKGROUND

### Prosecution

On March 29, 2017, J.S. got off the Sprinter in Oceanside and began walking to the gas station where she worked the night shift. She was carrying a large pink purse (about two to three feet tall and a foot and a half wide). J.S. began to run because she was late for work. While running, she noticed Handy, who was a homeless man, pushing a shopping cart. A young man on a bicycle turned in front of her, stopping her forward progress.

J.S. then felt her purse coming off her shoulder. She held on to it. When she turned, she saw Handy holding on to her purse and trying to pull it off her shoulder. The two tugged back and forth for a couple of seconds. In the process, Handy told J.S. to give him back his bag and called her a "fucking bitch." He said, "That's my fucking bag. Give me my fucking bag." Handy was angry and aggressive. However, J.S. thwarted Handy's attempt to take the purse. Eventually, Handy let go of the purse and left with the man on the bicycle. J.S. then ran to work and told the gas station security guard what had happened. The security guard called the police. During the incident, J.S.'s husband called her on her cell phone, and she told him what was happening.

## Defense

Handy testified in his defense and presented a much different series of events. According to Handy, he was waiting to get his social security money.<sup>3</sup> He was standing by a shopping cart. On top of the shopping cart, he placed his little black bag, which contained Handy's credit cards. The bag was "round" and the "size of a softball." He saw J.S. and asked, "How are you doing tonight?" She responded, "I'm fine. Going to work." He replied, "Jesus loves you." He then turned and noticed that his black bag was gone and J.S. had taken it and started running.

Handy's friend on a bicycle was nearby and asked, "What's the matter?" Handy told his friend, "Please go get my bag." His friend agreed to do so and gave Handy a "thing of meth" and two needles to hold in the meantime.<sup>4</sup> The bicycle never caught up to J.S., but when she saw it coming, she threw Handy's black bag down to the ground. When Handy caught up to her, he tried to be nice to her, but she cussed at him, so he responded, "You fucking bitch. You took my bag. Why did you take my bag?" She was on the phone with her husband and said, "You know that guy that's homeless, he just called me a fucking bitch. What should we do?" Her husband responded, "Go to work

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<sup>3</sup> Handy stated that, after 10 p.m., he could use his debit card to withdraw his money from the ATM. His social security payments are direct deposited into his account monthly and would be available at 10 p.m.

<sup>4</sup> When Handy was arrested, an Oceanside police officer found methamphetamine on Handy, which led to charging Handy with possession of methamphetamine. Handy's testimony was explaining why he had the methamphetamine. Handy does not challenge his conviction under count 2 here.

and tell the security guard you got robbed." Handy said, "Jesus still loves [you] and forgives [you]," retrieved his black bag from the ground, and left.

Handy maintained that he never grabbed J.S.'s purse. Nor did he come closer than "10 and 13 feet" from her. He never had any physical contact with J.S. Handy testified that he did not mistake her purse for his bag or some other bag. He described J.S.'s purse as a "big duffle bag" that "was over her whole entire body." Handy also said that J.S.'s purse was "bright pink" with "big flowers on it." He confirmed that he had no issue distinguishing J.S.'s purse from his bag.

## DISCUSSION

### I

#### *SUBSTANTIAL EVIDENCE OF ROBBERY*

##### A. Handy's Contentions

Handy maintains substantial evidence does not support his conviction for robbery. Specifically, he claims the prosecutor did not prove beyond a reasonable doubt that he had the required specific intent to be convicted of robbery. We disagree.

##### B. Standard of Review

The standard of review for a sufficiency of the evidence claim is well established. We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) "[T]he substantial evidence rule does not require that the evidence supporting defendant's

conviction be direct evidence. For purposes of the rule, substantial evidence encompasses circumstantial evidence and any reasonable inferences to be drawn from such evidence." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069-1070.) Our assessment is highly deferential to the verdict in that we presume every supporting fact the jury could have reasonably deduced from the evidence. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) A reversal is not warranted unless the evidence is insufficient to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Under a substantial evidence review, it is not the province of this court to reweigh evidence or reassess a witness's credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508 ["The testimony of one witness, if believed, may be sufficient to prove any fact."].)

### C. Analysis

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, against his will, accomplished by means of force or fear." (§ 211.) Because robbery includes a felonious intent to steal from another person, "a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938 (*Tufunga*).) " 'An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission.' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 24, quoting *People v. Medina* (2007) 41 Cal.4th 685, 694.)

Here, Handy points out that the only two percipient witnesses to the events in question agreed that Handy asserted the subject purse belonged to him. J.S. testified that while Handy attempted to take her purse from her, he told her to give him back his bag. Handy testified that J.S. took his black bag, he yelled to his friend to help him retrieve his bag, and he walked in J.S.'s direction to get his bag. Handy therefore argues that both J.S. and he testified that at the time of the incident, Handy asserted that the subject bag belonged to him. And, accordingly, the prosecution did not prove that Handy had the specific intent to take J.S.'s property. We are not persuaded.

Handy glosses over a major discrepancy between the two version of events testified to by J.S. and Handy. J.S. testified that Handy attempted to take her large, pink purse. Handy stated that J.S. took his small, black bag. At trial, Handy said that he easily could distinguish J.S.'s purse from his bag. He also testified that he did not mistake J.S.'s

purse for some other bag. Thus, based on the evidence presented at trial, the jury could have found that Handy attempted to take J.S.'s purse by force or fear and that he did not mistake it for his own bag. In other words, the jury could infer when Handy told J.S. to give him back his bag while he was trying to take the large, pink purse, he did not believe that purse to be his. Therefore, substantial evidence supports the jury's verdict on count 1.

Moreover, our conclusion is not undermined by the jury taking one and a half days to return a verdict or requesting a readback of J.S.'s and Handy's testimony. Nor does it alter our finding of substantial evidence that the jury also asked for a readback of the arresting officer's testimony and wanted to see a copy of the officer's report. The jury's actions simply show that it took its fact finding role seriously and tried its best to weigh the evidence. Even if we accept Handy's argument that this was a close case, that fact does not undercut the substantial evidence that supports the verdict.

## II

### *THE ADMISSION OF THE PRIOR ROBBERY CONVICTION*

#### A. Handy's Contentions

Handy argues the trial court abused its discretion by allowing the prosecution to cross-examine two character witnesses for the defense with Handy's 2011 robbery conviction to rebut their opinions as to Handy's good character. He also claims the court abused its discretion in admitting the robbery conviction to impeach Handy. Handy maintains that the evidence was admitted in violation of Evidence Code section 352. We reject these contentions.

## B. Background

Under Evidence Code section 352, Handy moved in limine to exclude evidence of his 12 prior convictions. The prosecution sought to admit three prior convictions as impeachment evidence. The convictions were a September 26, 2007 conviction for felony check fraud (§ 470, subd. (d)); an April 15, 2008 conviction for burglary (§ 459); and a December 27, 2011 conviction for robbery (§ 211). Noting that the three prior convictions "involve moral turpitude[,]" the court determined that the prosecution could use the three prior convictions as impeachment evidence if Handy testified at trial. The court noted that defense counsel might call character witnesses on behalf of Handy. Thus, the court cautioned Handy's trial counsel that the court could "broaden its ruling as far as the use of these priors as it relates to character evidence that you're presenting in your case in chief about Mr. Handy." However, the court did not make a specific ruling about the prosecution using the prior convictions in cross-examining any character witnesses, but indicated it would address the issue if it arose at trial.

At trial, Handy called two witnesses, a restaurant employee and a correctional officer, to testify about his good character. The restaurant employee testified that he had known Handy for two years, and he was a frequent guest of the restaurant. The restaurant employee recalled times when Handy did not have enough money to pay for his food, but promised to return with money to pay later. Handy kept his promise.

The restaurant employee also testified that Handy never caused any problems at the restaurant. In fact, Handy helped management remove homeless people who loitered

at the restaurant. On direct examination, the restaurant employee stated that he did not know if Handy had a criminal record.

After the conclusion of the direct examination of the restaurant employee, the court called a sidebar. The court noted that the witness testified about Handy's good character. The prosecutor argued that he should be able to question the witness about the three prior convictions that show moral turpitude to see if they would change the witness's opinion as to Handy's character. Defense counsel responded, "Actually, I think that's the law."

On cross-examination, among other things, the prosecutor asked the restaurant employee if his opinion of Handy would change if he knew that Handy was convicted: (1) in 2007 of felony check fraud, (2) of felony burglary in 2008, and (3) of robbery in 2011. The witness responded in the negative. He stated that the three felony convictions did not impact someone's character for honesty.

The correctional officer had known Handy for about three years. The correctional officer found Handy to be a nice person who was not somebody to be afraid of. The correctional officer had seen Handy give food and items to homeless people. Handy also had refused money the correctional officer had offered him. The correctional officer had never witnessed Handy being aggressive. The correctional officer testified that he was surprised that Handy was on trial for robbery. He stated that committing a robbery was out of character for Handy.

On cross-examination, the prosecutor asked the correctional officer about Handy's three prior convictions. In response, the witness noted that the convictions from 2007

and 2008 were old, and he did not know what Handy's circumstances were then and people could change. In response to the 2011 robbery conviction, the witness testified that it was "sounding like it's less out of character." Nevertheless, in the end, the witness concluded that the prior convictions did not change his opinion that the charge of robbery in the instant action was out of character for Handy because he did not know the exact circumstances of this case or the three previous convictions.

When Handy testified at trial, the prosecutor impeached him with Handy's 2011 robbery conviction. The exchange was brief and consisted of the following:

"Q: Okay. Isn't it true that in 2011 you were convicted of felony robbery in violation of Penal Code Section 211?

"A: I sure was.

"Q: All right."

#### C. Admission of Handy's Prior Robbery Conviction as Rebuttal Evidence to Good Character Evidence

The prosecution is generally prohibited from presenting evidence of a defendant's bad character to prove the defendant acted in conformity with that character in committing the charged offense. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357 (*Tuggles*); Evid. Code, § 1101, subd. (a).) In contrast, a defendant may present opinion or reputation evidence to show the defendant's character is inconsistent with a character trait associated with the charged offense, and hence the defendant did not likely commit the offense. (*Tuggles, supra*, at p. 357; *People v. Wagner* (1975) 13 Cal.3d 612, 617; *People v. Honig* (1996) 48 Cal.App.4th 289, 348-349; Evid. Code, § 1102, subd. (a).)

When a defendant presents good character evidence, the prosecutor may then present opinion or reputation evidence of the defendant's bad character to rebut the defendant's evidence and show a likelihood of guilt. (*Tuggles, supra*, 179 Cal.App.4th at p. 357; *People v. Siripongs* (1988) 45 Cal.3d 548, 578 ["A defendant has no right to mislead the jury through one-sided character testimony."]; Evid. Code, § 1102, subd. (b).)<sup>5</sup> Also, the prosecutor may test the reliability of the good character testimony by inquiring on cross-examination whether the witness has heard of specific instances of the defendant's misconduct that are inconsistent with the claimed good character trait. (*People v. Wagner, supra*, 13 Cal.3d at p. 619; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1528; *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954.) Thus, the defendant's decision to "call character witnesses to testify to his reputation respecting the relevant character trait involved in the offense charged [citations] . . . exposes himself to the calculated risk of having the witnesses subjected on cross-examination to questions respecting reports . . . of his conduct inconsistent with his reputation as testified to by the witnesses." (*People v. Kramer* (1968) 259 Cal.App.2d 452, 466.)

However, the scope of the prosecutor's rebuttal with bad character evidence is not unlimited. (*Tuggles, supra*, 179 Cal.App.4th at p. 357.) The prosecutor may not introduce " 'any and all "bad character" evidence the prosecution can dredge up.' "

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<sup>5</sup> Concerning the admissibility of character evidence, Evidence Code section 1102 states: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

(*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193; italics omitted.) Rather, the scope of rebuttal must be specific, and the rebuttal must be directly related to the particular character trait offered by the defendant on his behalf. (*Ibid.*) On appeal, we review the trial court's ruling concerning the admission of rebuttal evidence for abuse of discretion. (*People v. Raley* (1992) 2 Cal.4th 870, 912.)

As a threshold matter, the People contend Handy forfeited any objection to the admission of the 2011 robbery conviction. We agree. At a sidebar, the prosecutor argued that he should be allowed to rebut evidence of good character with three of Handy's prior convictions. When the court asked Handy's trial counsel for a response, he did not object, but instead, agreed that the prosecutor was entitled to do so. Accordingly, Handy's objections to the admission of his prior convictions have been forfeited. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Catlin* (2001) 26 Cal.4th 81, 122-123.)

That said, even if we were to consider the substance of Handy's argument, we would find his contention that the admission of the prior convictions evidence violated Evidence Code section 352 is without merit. At trial, two witnesses testified about positive impressions of Handy based on their interactions with him. One witness even testified that "robbery" or "any kind of theft or anything like that" would be out of character for Handy. The fact that Handy had been convicted of robbery just over five years before allegedly committing the current offense was highly probative to impeach the witnesses' respective beliefs that it was not in Handy's character to commit such a crime. No specific details of the prior conviction were provided, and the conviction itself was not separately admitted into evidence.

Evidence may be excluded under Evidence Code section 352 if its probative value is "substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 229.) The prosecutor's use of Handy's 2011 robbery conviction to cross-examine the character witnesses directly rebutted their testimony that Handy was not the type of person to commit robbery. That the jury heard about the 2011 robbery conviction was certainly damaging to the defense, but it was not unduly prejudicial. Indeed, it was the exact calculated risk Handy bargained for when he decided to call the witnesses, and it came as no surprise because it was discussed during motions in limine. (*People v. Kramer, supra*, 259 Cal.App.2d at p. 466 [defendant's decision to "call character witnesses to testify to his reputation respecting the relevant character trait involved in the offense charged [citations] . . . exposes himself to the calculated risk of having the witnesses subjected on cross-examination to questions respecting reports . . . of his conduct inconsistent with his reputation as testified to by the witnesses"].) Here, there was nothing unduly prejudicial in allowing the jury to hear that Handy was convicted of robbery five years before the trial in response to Handy's character witnesses' testimony that Handy was nice and not the type of person who would commit a robbery. Simply put, the court did not abuse its discretion in admitting the evidence.

#### D. Impeachment of Handy with Prior Robbery Conviction

Any felony conviction necessarily involving moral turpitude may be used to impeach a witness at a criminal proceeding. (Cal. Const., art. I, § 28, subd. (f)(4); *People v. Castro* (1985) 38 Cal.3d 301, 306.) Moral turpitude is conduct that indicates

dishonesty, bad character, a general readiness to do evil, or moral depravity of any kind. (*Id.* at pp. 314-315.) Robbery is a crime of moral turpitude. (*People v. Brown* (1985) 169 Cal.App.3d 800, 806.)

The admission of prior conduct involving moral turpitude to impeach a defendant is subject to the trial court's exercise of discretion under Evidence Code section 352. (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*); *People v. Wheeler* (1992) 4 Cal.4th 284, 290-296 (*Wheeler*).) "[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Wheeler, supra*, at p. 296, fn. omitted.) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Clark, supra*, at p. 931.)

Because the trial court's discretion to admit or exclude impeachment evidence "is as broad as necessary to deal with the great variety of factual situations in which the issue arises" (*People v. Collins* (1986) 42 Cal.3d 378, 389), a reviewing court ordinarily will uphold the trial court's exercise of discretion. (*Ibid.*; *People v. Hinton* (2006) 37 Cal.4th 839, 887-888.)

In conducting the balancing required under Evidence Code section 352, the initial consideration is the probative nature of the evidence. During trial, Handy's credibility

was a central issue, given that his defense depended on the jury believing his testimony that J.S. had taken his black bag. It is well established "that prior convictions . . . for robbery . . . are probative on the issue of the defendant's credibility." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Consequently, the trial court reasonably could view the evidence of Handy's prior robbery conviction as highly probative of a central disputed issue at trial.

Not surprisingly, Handy discounts any probative value of his prior robbery conviction. Instead, he insists the admission of the prior robbery conviction was unduly prejudicial because it was the same offense as in the instant action. Admitting evidence that the defendant was previously convicted of an identical crime may create a risk of prejudice because of " 'the inevitable pressure on lay jurors to believe "if he did it before he probably did so this time" ' " and to treat the prior conviction as propensity evidence rather than to use it solely to assess the defendant's credibility. (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) However, as our Supreme Court has explained, "[a]lthough the similarity between the prior convictions and the charged offenses is a factor for the court to consider when balancing probative value against prejudice, it is not dispositive." (*Clark, supra*, 52 Cal.4th at p. 932.) Thus, " '[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion.' " (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) " 'While before passage of Proposition 8 [in 1982], past offenses similar or identical to the offense on trial were

excluded, now the rule of exclusion on this ground is no longer inflexible.' "<sup>6</sup> (*People v. Hinton, supra*, 37 Cal.4th at p. 888.) The trial court was accordingly within its discretion to admit the evidence of the prior robbery conviction despite their similarity to the charged offense, based on the highly probative nature of the evidence.<sup>7</sup>

### III

#### *JURY INSTRUCTIONS*

##### A. Handy's Contentions

Handy raises two issues regarding the jury instructions. First, he claims the court erred in failing to provide a claim-of-right instruction. Second, Handy asserts the court gave an incorrect mistake-of-fact instruction. He maintains each of these errors was prejudicial. We reject these contentions.

##### B. Background

In its preliminary discussion of jury instructions after the close of evidence, the trial court asked defense counsel if he was proposing any instructions. Counsel responded in the affirmative, but stated he did not have jury instructions physically in front of him. Handy's trial counsel then explained: "I think based on the complaining

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<sup>6</sup> For this reason, our analysis does not change based on Handy's reliance on two cases (*People v. Cole* (1982) 31 Cal.3d 568; *People v. Fries* (1979) 24 Cal.3d 222) that predate the passage of Proposition 8, which the people of California voted to enact on June 8, 1982. (See *Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 443.)

<sup>7</sup> Handy's undue prejudice argument also is undermined by the fact the court did not err in allowing the prosecutor to question two witnesses about Handy's 2011 robbery conviction. As such, when the prosecutor impeached Handy with the 2011 robbery conviction, the jury already was aware of this prior conviction and Handy was not prejudiced by the jury briefly hearing about it again.

witness's testimony, that he said, 'That's my bag. Give me my fucking bag,' I think that should be mistake of fact, and should be given, number 3406." The prosecutor did not object.

The next morning the court went over the instructions with the parties. The court specifically discussed CALCRIM No. "3406, as requested by the defense. Mistake of fact." The court asked whether there were any further comments from either side. Each side responded in the negative. Defense counsel did not request a claim-of-right instruction.

Among other instructions, the court provided the mistake-of-fact instruction to the jury:

"The defendant is not guilty of attempt robbery if he did not have the intent or mental state or required to commit the crime because he reasonably did not know a fact or reasonably and mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit attempt robbery. If you find that the defendant believed that [J.S.] stole his black softball size bag, and if you find the belief was reasonable, he did not have the specific intent or mental state required for attempt robbery.

"If you have a reasonable doubt whether the defendant had a specific intent or mental state required for attempt robbery, you must find him not guilty of that crime."

During closing argument, Handy's trial counsel began by focusing on the testimony that supported Handy's theory that he was trying to retrieve his property:

" 'That's my bag. Give me my fucking bag.' That's one of the few statements, one of the few things that both sides agreed on when they testified. Mr. Handy was asking for his bag. 'Give me my

fucking bag. It's mine.' He was trying to recover his property. All that happened that night."

However, defense counsel did not argue that Handy was trying to take J.S.'s purse, mistakenly believing it was his bag. To the contrary, counsel asserted that it was Handy who had his bag taken and simply wanted it returned to him. In support of this defense theory, counsel argued J.S. was not credible. He pointed out why her version of events did not make sense. He commented that her trial testimony differed with what she told the investigating officer regarding where the attempted robbery occurred. Counsel claimed J.S. changed her story so that the attempted robbery took place in an area with sufficient light to allow Handy to clearly see her purse.

In continuing to question J.S.'s credibility, defense counsel returned to J.S.'s testimony as to what Handy said when he grabbed her purse. To this end, counsel argued:

"And between [J.S.'s] story and Mr. Handy's story, some of the statements -- some of the things that happened, just make no sense. If he said, 'That's my bag. Give me my fucking bag,' he thinks she has his property. You don't say that if you're going to grab that purse. You say: Give me that purse. Give me that. Then you grab it. You don't say: That's mine. That makes no sense whatsoever."

Thus, in attacking J.S.'s credibility, Handy's trial counsel maintained that her testimony that Handy said, "That's my bag. Give me my fucking bag" was nonsensical. Put differently, according to defense counsel, the jury should not believe any of J.S.'s testimony. Someone who is trying to take someone else's property does not refer to the property as his own as he is grabbing it.

### C. Standard of Review

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether error has been committed in giving jury instructions, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all jury instructions which are given. (*Ibid.*) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ibid.*) "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

### D. The Claim-of-Right Instruction

Handy claims that the court erred in failing to provide the jury with a claim-of-right instruction.<sup>8</sup> "The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*Tufunga, supra*, 21 Cal.4th at p. 938.) However, a trial court is not required to give a

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<sup>8</sup> CALCRIM No. 1863 is a standard jury instruction that delineates the claim-of-right defense. That instruction provides in relevant part: "If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it."

claim-of-right instruction sua sponte under all circumstances. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 874 ["[B]ecause the asserted claim of right served only to negate the intent to steal element of the robbery charges and the trial court otherwise properly instructed the jury on this element, it was not required to instruct on the defense in the absence of a request by trial counsel."]) Here, the trial court properly instructed the jury regarding the intent element of robbery per CALCRIM No. 1600, explaining that to be guilty of robbery, Handy had to take "property that was not his own" and "intended to deprive the owner of it permanently." And Handy asserts on appeal that his putative claim of right in this case would have negated the intent to steal element. As such, under the circumstance presented here, the trial court had no sua sponte obligation to provide a claim-of-right instruction. (*Covarrubias, supra*, at p. 874.)

Handy does not dispute that the trial court did not have an obligation to sua sponte provide a claim-of-right instruction. However, he claims his trial counsel was requesting such an instruction when he referred to mistake of fact. We are not persuaded.

When asked whether he was proposing any jury instructions, defense counsel stated that he did not have the jury instructions in front of him, but he would be requesting a mistake-of-fact instruction and specifically referred to CALCRIM No. 3406. Handy argues here that his trial counsel misspoke and meant to reference a claim-of-right instruction, which is CALCRIM No. 1863. Handy implies that his counsel might have confused CALCRIM No. 1863 with CALCRIM No. 3406 because he did not have the written instructions in front of him. If this was the only discussion in the record regarding jury instructions, perhaps Handy's contention might be well taken. However,

Handy's argument loses its persuasive appeal when we view defense counsel's comments in the context of the additional discussion regarding jury instructions. After the initial reference to mistake of fact, the parties and the court discussed jury instructions the following day. Therefore, Handy's trial counsel had the opportunity to return to his office, review potential jury instructions, and ensure that he proposed his desired instructions. During the second discussion of jury instructions, the court also specifically discussed CALCRIM No. 3406 (mistake of fact). At that point, defense counsel had the opportunity to request a claim-of-right instruction. He did not do so even when asked by the court if there were other instructions that needed to be discussed. Against this backdrop, we conclude that Handy's trial counsel intentionally asked for a mistake-of-fact instruction not a claim-of-right instruction.

By failing to object to or request a specific jury instruction at trial, Handy forfeited this claim on appeal, unless the claimed error affected Handy's substantial rights. (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim--at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We conclude that Handy has not shown that the claimed error affected his rights; thus, he has forfeited his claim.

A trial court is not required to instruct on a claim-of-right defense unless there is substantial evidence to support it. (*People v. Anderson* (2015) 235 Cal.App.4th 93, 100; *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Accordingly, the trial court need not

instruct on a claim-of-right defense if there is only "minimal and insubstantial" evidence to support it. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148 (*Dominguez*); *Barnett, supra*, at p. 1145.) Also, as with any defense instruction, a claim-of-right instruction is not required where it is inconsistent with the defendant's theory of defense. (*Dominguez, supra*, at p. 1148.)

Here, the evidence that Handy believed he had a right or claim to the property he attempted to take was scant. J.S. testified that Handy tried to pull her large pink purse off her shoulder. During the struggle, Handy said, "That's my fucking bag. Give me my fucking bag." Ostensibly, such testimony might give rise to a claim-of-right defense. Yet, Handy's own testimony undercut any such defense.

Handy testified that he never touched J.S.'s purse. In fact, he claimed he never came closer than 10 to 13 feet from J.S. He stated that he did not and would not confuse his black bag with J.S.'s large pink purse. He also testified that J.S. took his black bag, but then threw it to the ground, and Handy was able to retrieve it. In short, Handy's testimony does not establish that he grabbed J.S.'s purse believing it to be his bag. To the contrary, Handy insisted he never touched J.S.'s bag whatsoever.

A claim of right to the object of the attempted robbery (here, the large, pink purse) would require Handy to have confused that object with his own black bag. (See *People v. Covarrubias, supra*, 1 Cal.5th at p. 874 ["The good faith belief in a claim of right . . . must relate to specific property."].) Such confusion appears to be highly improbable on the record before us. J.S.'s purse and Handy's bag were extremely different. The purse was bright pink, two to three feet tall and one and a half feet wide. In contrast, the bag

was black and small (softball sized). Further, Handy testified at trial there was "no possible way" he could have mistaken J.S.'s purse for his bag. Handy's testimony significantly undercuts any potential claim-of-right defense that J.S.'s testimony might have raised. Alternatively stated, there was only "minimal and insubstantial" evidence to support a claim-of-right defense; thus, the court did not have to provide such an instruction. (*Dominguez, supra*, 39 Cal.4th at p. 1148.)

Indeed, Handy's trial counsel did not argue consistent with a claim-of-right defense during closing argument. Instead, he asserted that J.S.'s testimony that Handy tried to take her purse while referring to it as his was "nonsensical," undermined J.S.'s credibility, and supported Handy's version of events. He did not tell the jury that even if it believed J.S.'s versions of events, it could not convict Handy of robbery because he believed the purse was his. Defense counsel settled on a different tactic, insisting Handy was credible and J.S. was not. Therefore, a claim-of-right instruction was inconsistent with Handy's theory of defense. (*Dominguez*, 39 Cal.4th at p. 1148.)

Against this background, we cannot say that the failure to provide a claim-of-right defense instruction violated Handy's substantive rights. Consequently, Handy forfeited his challenge here by not requesting such an instruction below. (See *People v. Flood, supra*, 18 Cal.4th at p. 482, fn. 7.)

In response to a possible finding of forfeiture, Handy argues his trial counsel was constitutionally ineffective for failing to request a claim-of-right instruction. To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the

"deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) It is the defendant's burden to prove the inadequacy of trial counsel, and defendant's burden is difficult to satisfy on direct appeal. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349 (*Ray*); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.)

The United States Supreme Court explained that "[j]udicial scrutiny of counsel's performance must be highly deferential [because] [i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (*Strickland, supra*, 466 U.S. at p. 689.) Thus, the court explained, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (*Ibid.*; see *People v. Lucas* (1995) 12 Cal.4th 415, 437, quoting *Strickland, supra*, at p. 689 ["[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' "].) We reverse on the ground of inadequate assistance only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*Lucas, supra*, at p. 437.)

Here, Handy's trial counsel appears to have made a tactical decision to bolster Handy's credibility and undermine J.S.'s credibility. To this end, defense counsel offered

two character witnesses on behalf of Handy. During closing argument, he told the jury that J.S.'s version of events was not believable and that Handy told the truth. In short, Handy's trial counsel did not offer a claim-of-right defense. He proffered an innocence defense in that Handy was the actual victim of a crime. An assertion of ineffective assistance of counsel is not a means to second guess defense counsel's strategic decision. (See *Lucas, supra*, 12 Cal.4th at pp. 436-437.) We conclude Handy's ineffective assistance of counsel claim is without merit.

#### D. The Mistake-of-Fact Instruction

Handy next argues that the trial court prejudicially erred by improperly instructing the jury on the mistake-of-fact defense. The People concede the trial court erred, but maintain there was no evidence that supported the instruction and mistake of fact was inconsistent with the defense presented at trial. Also, the People contend the error was harmless in any event. We agree that the error was harmless.

A defendant is not guilty of a crime if he or she did not have the intent or mental state to commit it due to a mistaken factual belief. (§ 26, subd. (3).) For general intent crimes, the defendant's belief must be reasonable; for specific intent crimes, it does not. (CALCRIM No. 3406, Bench Notes ["If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable."], citing *People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426.)

Attempted robbery requires a felonious intent to steal from another person, and "a defendant's good faith belief, even if mistakenly held, that he has a right or claim to

property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*Tufunga, supra*, 21 Cal.4th at p. 938.) Thus, in an attempted robbery case, a defendant's mistake of fact as to whether the property he is taking belongs to him is a complete defense, even if his belief was unreasonable.

Here, the court instructed the jury that Handy "is not guilty of attempt robbery if he did not have the intent or mental state or required to commit the crime because he *reasonably* did not know a fact or *reasonably* and mistakenly believed a fact." That is an incorrect statement of the law. The trial court erred. However, that error was harmless beyond a reasonable doubt.<sup>9</sup>

A mistake-of-fact defense "requires, at a minimum, an actual belief 'in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act . . . .'" (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115, quoting *People v. Russell, supra*, 144 Cal.App.4th at p. 1425.) On the record before us, the mistake-of-fact defense would only be available if Handy believed the purse he tried to take from J.S. belonged to him. There is paltry evidence to support this conclusion. Further, that evidence comes from J.S.'s testimony, was directly contradicted by Handy's testimony, and Handy's trial counsel did not argue a mistake-of-fact defense during closing argument.

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<sup>9</sup> The parties disagree whether prejudice should be analyzed under the standard generally applied to federal constitutional errors, *Chapman v. California* (1967) 386 U.S. 18, 24, or the less stringent standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. We need not resolve this issue because the error was harmless even under the *Chapman* standard.

To convict Handy of robbery, the jury accepted J.S.'s version of events. J.S. was walking to work with her large pink purse on her shoulder. Someone riding a bike stopped in front of her, and Handy attempted to take her purse off her shoulder. While he was doing so, Handy said, "That's my fucking bag. Give me my fucking bag." Thus, to find a valid mistake of fact defense, the jury would have to find that Handy believed that J.S.'s large, bright pink purse was his small, black bag based solely on J.S.'s testimony regarding what Handy said.<sup>10</sup>

But Handy denied ever grabbing J.S.'s purse. He also stated that he would not have confused his small, black bag with J.S.'s large, bright pink purse. And during closing argument, Handy's trial counsel did not argue a mistake-of-fact defense, but instead, insisted J.S. was not credible and Handy was the real victim when J.S. ran off with his small, black bag.

With this foundation in mind, we conclude the instructional error was harmless beyond a reasonable doubt. We find no reason to reverse the verdict based on an

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<sup>10</sup> J.S.'s testimony regarding what Handy said while trying to take her purse was inconsistent. On direct examination, she stated that Handy said to "give him his purse." On cross-examination, she stated that Handy said, "That's my fucking bag. Give me back my fucking bag." On redirect, J.S. admitted that she did not specifically recall whether Handy used the word "purse" or "bag," but if she had "to say which one, it probably would be the word 'bag.' "

improper instruction for a defense that Handy testified did not apply to him and his counsel did not argue to the jury.<sup>11</sup>

#### IV

#### *MOTION TO STRIKE PRIOR STRIKE*

##### A. Handy's Contention

Handy claims the trial court abused its discretion in denying his *Romero* motion urging the court to dismiss the 2011 robbery conviction as a prior strike for sentencing purposes. We disagree.

##### B. Background

At the sentencing hearing, defense counsel requested the court, under section 1385 and *Romero*, dismiss Handy's 2011 robbery conviction for purposes of sentencing. Counsel noted that the facts of the current conviction were "de minimus" when compared with other robberies (no weapons were used, the incident only involved five seconds of pulling on a purse, and Handy let go as soon as J.S. raised her fist). Defense counsel also pointed out that Handy did not physically attack J.S.<sup>12</sup>

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<sup>11</sup> Handy also claims his trial counsel was constitutionally ineffective based on the failure to object to the incorrect mistake-of-fact instruction. We reject this claim because Handy has not shown that he was prejudiced by the complained of conduct.

<sup>12</sup> In his statement in mitigation and in support of probation, Handy implied that he was under the influence of drugs when he committed the instant crime: "Mr. Handy had a relapse into drug use that has plagued him throughout the last twenty years." Handy did not present evidence at trial that he was under the influence of drugs or alcohol when the subject robbery occurred. Moreover, in the probation report, it indicates that Handy claimed that he was not using methamphetamine or alcohol at the time of his encounter with J.S.

Handy's trial counsel emphasized that after Handy was released from prison for the 2011 conviction, he had four successful years on parole, and had not been further arrested for felony activity, other than the robbery of J.S. Counsel also observed that Handy was suffering from medical issues, like diabetes and internal organ problems.

Handy addressed the court. He expressed no remorse and denied that he committed any crime. He complained that "you guys" had "trashed" him, "demoralized" him and his family, and told him that he was "a piece of shit." He then referred to the prosecutor ("this fucking guy") as a "liar" and "a piece of shit." After the court asked Handy not to assault the prosecutor, Handy responded:

"He's a piece of shit. He lied. He got lied to, and he lied on the stand about me because you know it. You have intelligence. You saw it. [¶] I am fighting for my life. This is my life. That's why I'm mad. Okay? It's not your life. It's my life. I am hysterical. I'm not that kind of person. You're killing me. You're killing me with two people right now with a lie."

Handy's mother then addressed the court. She stated her son was very emotional, suffered from diabetes, has MRSA (methicillin-resistant staphylococcus aureus), and has only one arm. She argued that J.S. was a bad person, who had been trying to get homeless people off "that corner for a while." Handy's mother emphasized that Handy was a good person who was mistreated by J.S.

The prosecutor stated he was opposed to striking the prior strike because of Handy's prior violent felony conviction. He also pointed out that the 2011 robbery conviction was recent and the facts of the instant matter were not de minimus as argued

by defense counsel. To this end, the prosecutor emphasized that Handy targeted a woman, "who is small in stature," late at night.

After hearing argument from counsel, reviewing the probation report,<sup>13</sup> and having the benefit of presiding over the trial, the court stated that it found "very few mitigants," and denied Handy's *Romero* request. The court said that because Handy had a "nickel prior" and a "strike prior," it had "adequate sentencing parameters," and selected the low term of 16 months, doubled to 32 months, for the robbery, with a consecutive five years for the serious felony prior. The court also imposed concurrent terms for the prison priors. After the court announced Handy's sentence, Handy verbally lashed out at the court with several expletive riddled onslaughts.

### C. Standard of Review

In deciding whether to grant a *Romero* motion, the trial court must " 'consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*)), quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review a ruling on a *Romero* motion for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 376.) "In reviewing for abuse of discretion, we are guided by two

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<sup>13</sup> J.S. told the probation officer that she did not believe Handy should be incarcerated.

fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree . . . " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

#### D. Analysis

There was no abuse of discretion here. The trial court presided over the trial, noting that it knew "what happened in this case." It considered the probation report, arguments of counsel, Handy's statements, and his mother's statements. Handy had a lengthy criminal history, including a dozen prior convictions and multiple prison terms. In fact, at the time of sentencing, Handy had another criminal case pending against him that the prosecution dismissed following sentencing in the instant matter. The prior strike that Handy asked the court to strike was a robbery in which Handy held up a restaurant cashier and demanded money with what appeared to be a gun. For the instant offense, Handy accosted a woman at night and tried to pull her purse off her shoulder. Despite being convicted of the crime, Handy continued to deny he did anything wrong, claiming

he was the victim. He also was belligerent with the prosecutor and the court during sentencing.<sup>14</sup>

Here, Handy glosses over much of the negative aspects of the record and repeats many of the same arguments he made below, contending he does not fall within the spirit of the three strikes law. In doing so, he essentially asks this court to reweigh the factors presented at the sentencing hearing and arrive at a different conclusion. That is not our role here. Based on the record before us, Handy has not shown that the trial court's denial of his *Romero* motion was "so irrational or arbitrary that no reasonable person could agree with it." (See *Carmony, supra*, 33 Cal.4th at p. 377.)

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.

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<sup>14</sup> Even though the court did not strike Handy's prior strike, the court showed Handy some leniency selecting the low term for robbery and running all six prison priors concurrently to his sentence.